CA NO. 04-99003

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

* * *

TERRY JESS DENNIS, by and through KARLA BUTKO, as Next Friend,

Petitioner-Appellant,

vs.

MICHAEL BUDGE, Warden, and BRIAN SANDOVAL, Attorney General of the State of Nevada,

Respondents-Appellees.

D.C. No. CV-S-04-0798-PMP-RJJ
(Nevada, Las Vegas)

Appeal from the United States District Court for the District of Nevada

APPELLANT'S OPENING BRIEF

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I.

STATEMENT OF JURISDICTION

This is an appeal from the denial of a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, by a person in state custody, filed by a next friend.

a) The district court had jurisdiction over the petition under 28 U.S.C. §§ 2241 and 2254.

b) The district court's order finally disposed of the petition by denying it in its entirety. 28 U.S.C. § 2253(a).

c) The district court entered its order denying the petition on July 6, 2004. XI Excerpts of Record (ER) 1889. A notice of appeal was filed on July 6, 2004. XI ER 1904; 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1)(A) and (a)(4)(A)(v).

d) The district court sua sponte issued a certificate of appealability on July 7, 2004, permitting the appeal to go forward. XI ER 1907; 28 U.S.C. § 2253(c); Fed. R. Civ. P. 22(b)(1); Circuit Rule 22-1.

II.

STATEMENT OF THE CASE AND FACTS

Terry Dennis was sentenced to death for killing Ilona Straumanis during a bout of drinking and sex, when she allegedly taunted him about his sexual performance or

about his supposed inability to kill anyone. V ER 890-891, 897-898. Straumanis' blood alcohol level was estimated at .37 at the time of her death. V ER 771, VI ER 972, and Mr. Dennis had been drinking "a lot." VI ER 996. Mr. Dennis claimed his recollection of the homicide was "fuzzy." VI ER 979. After the killing, Mr. Dennis remained in the motel room with the body and continued drinking, and then called the police and asked them to come and arrest him. V ER 821-825. In his confession to the police, Mr. Dennis falsely claimed to have committed other killings. II ER 160.

Mr. Dennis was charged with first degree murder in the Nevada state district court in Washoe County and the State filed a notice of intent to seek the death penalty. IV ER 644, 648. On March 19, 1999, Dr. Edward Lynn, a psychiatrist, examined Dennis. Dr. Lynn recorded Mr. Dennis' self-reported history of sexual and physical abuse, his previous diagnoses of post-traumatic stress disorder and bipolar II disorder, his "bouts of depression," and at least one hospitalization but only one previous suicide attempt. The report noted his "severe psychological disorder" and rated his depression as "moderate to severe," but despite the conclusion that Mr. Dennis was "clinically depressed," the report indicated that he "understands the charges against him and . . . is fully capable of assisting his attorney in the preparation of his defense." IV ER 741-742. Dr. Lynn was not asked for, and did not express, an opinion as to whether Mr. Dennis' mental illness affected his ability to

make a rational choice to seek execution. IV ER 740-742.

On April 16, 1999, Mr. Dennis pleaded guilty to the murder charge. IV ER 655, 700, 705. At the penalty hearing before a three-judge panel, uncontradicted evidence was before the court that Mr. Dennis suffers from mental illness, including bipolar disorder and post-traumatic stress disorder, and that he had a long history of suicide attempts and abuse at the hands of his family. It was also undisputed that before the homicide for which the death sentence was imposed, Mr. Dennis sought help for his mental disorders, which were making him want to kill someone. IV ER 583, V ER 790, 859. The Veteran's Administration admitted him briefly, medicated him, and then "cut [him] loose." V ER 859. Mr. Dennis refused to allow introduction of mitigating evidence beyond his own statements and his mental health records. VI ER 1063, 1070-1071, VII ER 1088. The three-judge sentencing panel obliged Mr. Dennis' wish for self-destruction and imposed a death sentence. VII ER 1146.[1] The Nevada Supreme Court affirmed the conviction and sentence. Dennis v. State, 116 Nev. 1075, 13 P.3d 434 (2000). VII ER 1165.

Mr. Dennis then filed a verified petition for writ of habeas corpus in the district

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[1] The only aggravating factors found were based on prior convictions, one of which involved a prior conviction for second-degree arson and assault. VII ER 1136. The assault conviction arose when police responded to the arson complaint. Mr. Dennis waved a knife at a group of policemen, and he was the only one injured in the offense, when he was shot by the police. VI ER 1038-1040.

court. VII ER 1153. The district court ultimately denied all relief and Mr. Dennis appealed. IX ER 1512, 1517. Counsel filed an opening brief on appeal on September 16, 2003, raising substantial issues. IX ER 1524.

After the notice of appeal was filed, Mr. Dennis wrote to the state district court, the district attorney, and the Nevada Supreme Court, expressing a desire to abandon the appeal in order to be executed. IX ER 1520, X ER 1563, 1572. On motion of the state, X ER 1567, the Nevada Supreme Court remanded the case to the district court to determine if Mr. Dennis was competent to decide to withdraw the appeal. X ER 1573.

On remand, the district court appointed a psychiatrist, Thomas E. Bittker, M.D., to examine Mr. Dennis and furnish a report on his capacity to proceed. The court directed Dr. Bittker to answer the standard inquiries made in connection with competence to proceed to trial. X ER 1590. The district court did not ask Dr. Bittker to provide an opinion on Mr. Dennis' mental state under the standard enunciated in Rees v. Peyton, 384 U.S. 312, 314 (1966) (per curiam), that is, whether Mr. Dennis' decision was "substantially affected" by his mental disorder.

Dr. Bittker examined Mr. Dennis on November 24, 2003, reviewed records, interviewed counsel, and prepared a report. X ER 1595. Dr. Bittker's report diagnosed Mr. Dennis with bipolar disorder, chemical dependency, attention deficit

hyperactivity disorder (ADHD), post-traumatic stress syndrome (PTSD), mixed personality disorder with schizoid characteristics, and severe depression. Dr. Bittker's report reviewed evidence of a childhood filled with physical and sexual abuse at the hands of Mr. Dennis' adoptive parents. Mr. Dennis' background includes a significant history of poly-substance abuse, including use of amphetamines, cocaine, marijuana, and alcohol. He has sustained "frequent head injuries," but has never received a neuropsychological examination to confirm the extent of his impairment. Mr. Dennis has suffered from auditory and visual hallucinations. X ER 1599-1600.

Mr. Dennis suffers from a life-long history of suicidal ideation. Dr. Bittker's report notes a significant medical history of "chronic suicidal ideation since [Mr. Dennis] was a child," as well as a history of suicide attempts stretching back to 1966. X ER 1599. Mr. Dennis was discharged from military service in Vietnam due to the fact that he was "suicidal", X ER 1597;" he "had made several attempts to seek admission to the VA Hospital to contain his homicidal fantasies;" "he has admitted to at least four and as many as twelve suicide attempts," he "admits to frequent periods of despair, profound negativity, and feelings of hopelessness, helplessness, and worthlessness, X ER 1598-1600;" he experienced the death of a roommate in the week prior to the instant offense, and he sought hospitalization at the VA hospital in

the period immediately before committing the offence, but was "rejected." X ER 1600.[2] Dr. Bittker's report responded to the district court's specific questions in a way that would reflect a finding of competence to stand trial under that standard. X ER 1602.

Dr. Bittker also found, however, "with a reasonable degree of medical certainty, that the defendant's desire to both seek the death penalty and to refuse appeals in his behalf are directly a consequence of the suicidal thinking and his chronic depressed state, as well as his self-hatred." X ER 1602. Dr. Bittker's opinion is that it is:

> [L]ikely that both the defendant's offense and his current court strategy spring from his psychiatric disorder and his substance abuse disorder, that he wishes to die and he wishes to be certain of a reasonably humane death. Consequently, the death penalty, as provided by the state, is quite congruent with both his intent and his psychiatric disorder.

X ER 1602-1603. The district court conducted a hearing at which it admitted Dr. Bittker's report but at which, on the agreement of Mr. Dennis, it did not take testimony. X ER 1621. The court engaged in a colloquy with Mr. Dennis, in which

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[2] The documentation of Mr. Dennis' mental health history supports Dr. Bittker's report, indicating recurrent depression and multiple suicide attempts. II ER 268, 275-276, 279, 284, 293-295, 308, 313, III ER 343, 352, 395-396, 401, 414, 422-423, 437, 441, 474, IV ER 580, 583, 588, 593, 600, 602, 605, 610, 618, 722.

he essentially vouched for his own rationality. X ER 1614-1615, 1631-1641. The state district court ruled that Mr. Dennis was competent to waive his right to further review. X ER 1655.

The Nevada Supreme Court, without briefing, argument, or any analysis under the standard of Rees v. Peyton, directed counsel for Mr. Dennis to file a "voluntary" withdrawal of the appeal, in an order signed by one justice of the Court. X ER 1663. Counsel for Mr. Dennis filed a motion to withdraw the appeal on February 2, 2004.

On March 12, 2004, the Nevada Supreme Court filed an order dismissing the appeal. X ER 1698. It upheld the state district court's conclusion that Mr. Dennis' waiver of further proceedings was knowing, intelligent and voluntary, but, although its order cited Rees v. Peyton, it did not relate the standard of Rees to Dr. Bittker's report. X ER 1703. It also denied the Federal Public Defender's motion to submit a brief as amicus curiae, essentially on the ground that adversary litigation of the issue of Mr. Dennis' competence was not required. X ER 1702.

On May 17, 2004, the state district court issued a warrant of execution, scheduling the execution for the week beginning July 19, 2004. X ER 1711.[3] The

[3] Nev. Rev. Stat. § 176.495(2) provides that a warrant of execution in these circumstances must schedule the execution for a week beginning on a Monday that is no less than fifteen days nor more than thirty days from the date of the warrant. Despite the apparent invalidity of the warrant, the State and the state courts have done nothing to comply with the statute.

director of the Department of Corrections has scheduled the execution for July 22, 2004, at 9:00 p.m.

On June 14, 2004, a petition for writ of habeas corpus was filed in the United States District Court for the District of Nevada on behalf of Mr. Dennis by Karla Butko, a lawyer who had represented him in his state court habeas proceedings, and for whom Mr. Dennis has indicated he has "some positive regard." X ER 1600. On June 28, 2004, the State filed a motion to dismiss, asserting that Ms. Butko did not have standing to litigate the petition. XI ER 1773.

On July 1, 2004, the district court, the Honorable Philip M. Pro, Chief Judge, conducted a hearing on the petition and motion to dismiss. At that hearing, Dr. Bittker testified unequivocally that Mr. Dennis' desire to be executed is a product of his mental disorder. XI ER 1859-1860. Dr. Bittker's opinion is that Mr. Dennis' desire to seek execution at the time of trial was "motivated by his depression" and that his wish to make "the state . . . his vehicle for suicide . . . is a direct consequence of his mood disorder." XI ER 1857. Mr. Dennis' "fixed idea that he deserves and wants to die" is "a product of a mental disorder." In answer to the Court's question whether Mr. Dennis was "capable of volitionally making a rational decision" to forego further proceedings, Dr. Bittker - - an expert used more by the State than by defense counsel, XI ER 1866, 1886-1887, who has significant experience in treating

depression, XI ER 1850-1851, 1883-1885 - - testified:

> "I believe in this case, this is the one area where I don't think it is a volitional decision. I think it's a fixed decision that has been sustained since the instant offense and before."

XI ER 1859-1860. Under cross-examination, Dr. Bittker made it clear that he did not believe that "anyone that wants to drop his appeals and be executed . . . would necessarily be suicidal." XI ER 1861.

Dr. Bittker also testified that Mr. Dennis' apparently lucid demeanor did not indicate that he was capable of making a rational decision and did not contradict Dr. Bittker's view that his decision was motivated by his mental disorder rather than being volitional. In fact, Dr. Bittker testified (contrary to what a lay person might assume) that Mr. Dennis' adamant and unequivocal insistence on seeking execution is an indication that his decision is motivated by his mental disorder and is not the product of volition. XI ER 1858. If Dr. Bittker had been called to testify in the state proceedings, he would have given the same testimony he gave in the district court. XI ER 1867.

On July 6, 2004, the district court granted the motion to dismiss the petition and denied a stay of execution. XI ER 1889. A notice of appeal was filed the same day, XI ER 1904, and on July 7, 2004, the district court sua sponte issued a certificate

of appealability. XI ER 1907.

III

ISSUES PRESENTED FOR REVIEW

A. DOES A NEXT FRIEND HAVE STANDING TO LITIGATE A HABEAS CORPUS PETITION ON BEHALF OF A CONDEMNED INMATE, UNDER THE STANDARD OF REES v. PEYTON AND WHITMORE v. ARKANSAS WHEN THE UNCONTRADICTED EXPERT TESTIMONY SHOWS THAT THE INMATE'S DECISION TO SEEK EXECUTION IS "DIRECTLY A CONSEQUENCE" OF HIS MENTAL ILLNESS.

B. COULD THE DISTRICT COURT PROPERLY REJECT A NEXT FRIEND'S CLAIM OF STANDING BASED ON THE PRESUMPTION OF CORRECTNESS ACCORDED TO STATE COURT FACT FINDING.

1. When the state court's finding of competence was contrary to the only expert evidence received on the issue, and the additional evidence presented to the District Court unequivocally showed the inmate's incompetence; and

2. The state court finding was unreliable because it was produced in a non-adversary, and therefore fundamentally unfair, proceeding.

IV

SUMMARY OF THE ARGUMENT

This case is unique. To counsel's knowledge there is no other reported case in which the sole mental health expert who examined an individual specifically to assess the person's ability to make a rational decision to seek execution concluded

that the decision is "directly a consequence" of mental illness, X ER 1602, and has testified that the individual is using the state as "his vehicle for suicide" which he cannot accomplish himself, XI ER 1897, but both the state and federal courts have simply disregarded that uncontradicted evidence. In Rees v. Peyton, 384 U.S. 312, 314 (1966) (per curiam) the Supreme Court held that the standard for assessing whether an individual is competent to abandon litigation to seek death at the hands of the State is whether the person has the "capacity to . . . make a rational choice" or "is suffering from a mental disease, disorder or defect which may substantially affect his capacity . . ." See also Rumbaugh v. Procunier, 753 F.2d 395, 398 (5th Cir. 1985) (stating test as whether disorder "prevent[s] him from making a rational choice among his options"). Under any rational view of that standard, Dr. Bittker's report and testimony establish that Mr. Dennis is not competent.

The district court nevertheless held that Ms. Butko did not have standing to appear because she did not rebut the presumption of correctness of the state court finding that Mr. Dennis was competent. XI ER 1900-1901; 28 U.S.C. 2254(e)(1). The district court's ruling would transform the "presumption of correctness" into simple abdication. The uncontradicted evidence before the state court, in Dr. Bittker's report, was that Mr. Dennis' decision to seek death was "directly a consequence" of his mental illness. There was no contradictory evidence, other than

Mr. Dennis' own self-serving denial of suicide ideation, X ER 1637, which was itself inconsistent with his own previous acknowledgment of the chronic nature of his depressive disorder. See IV ER 669-670, VI ER 1053-1055.[4] Dr. Bittker, in testimony not presented to the state court, concluded that "he didn't have the courage to carry through the desire [to die], so the State becomes his vehicle for suicide," XI ER 1857, which is consistent with his "fixed," long-standing suicidal ideation. XI ER 1858. Further, the uncontradicted evidence presented to the district court established unequivocally that Mr. Dennis' decision is not a rational choice but is motivated by his mental illness. XI ER 1859-1860. The evidence also established that his apparently lucid demeanor and adamant insistence on his execution is not a sign of competence, but is not inconsistent with, or is affirmatively a sign of, the effect of his mental illness on that decision. XI ER 1858. In light of this evidence, the district court could not properly conclude that the presumption of correctness was not rebutted.

Finally, the presumption does not apply when "the process employed by the state court is defective." Taylor v. Maddox, 366 F.3d 992, 999 (9th Cir. 2004) (citations omitted). In this case, the state district court did not hear testimony from

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[4] The state courts did not suggest any conceivable reason why Dr. Bittker would misrepresent the facts, while Mr. Dennis' motive is obvious.

Dr. Bittker, and appointed counsel for Mr. Dennis made it clear that he was taking the ethical position that he would not litigate against his client's wishes, X ER 1621, 1625, and thus he did not present necessary testimony from Dr. Bittker (including testimony that would have alerted the court to the dangers of relying on Mr. Dennis' demeanor as an indication of competence. XI ER 1858). The absence of adequate adversarial testing of the evidence makes the state proceeding necessarily inadequate to produce reliable fact finding, and therefore the District Court erred in applying the presumption of correctness here.

V.

ARGUMENT

The District Court Erred in Dismissing the Petition on Standing Grounds, Where the Uncontradicted Evidence Showed that Mr. Dennis' Decision to Seek Execution is a Product of His Mental Illness and the State Court Finding of Competence Could not be Afforded a Presumption of Correctness.

STANDARD OF REVIEW: This Court reviews the dismissal of a petition for writ of habeas corpus de novo. E.g., Forn v. Hornung, 343 F.3d 990, 994 (9th Cir. 2003). The standing of a next friend is a jurisdictional issue, which is also reviewed de novo. Dearinger ex rel. Volkova v. Reno, 232 F.3d 1042, 1044 (9th Cir. 2000).

A. The Uncontradicted Expert Evidence Shows That Mr. Dennis' Decision to Seek Execution is a Product of His Mental Illness.

When a next friend seeks to litigate a habeas corpus petition on behalf of a death-sentenced inmate who seeks execution, the standard of competence is prescribed by Rees v. Peyton, 384 U.S. 312 (1966) (per curiam):

> [W]hether [the petitioner] has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises.

Id. at 314 (emphasis supplied); see Whitmore v. Arkansas, 495 U.S. 149, 166 (1990). In Rumbaugh v. Procunier, 753 F.2d 395, 398 (5th Cir. 1985), the Court of Appeals elaborated the test as posing three issues:

> (1) Is the person suffering from a mental disease or defect?
>
> (2) If the person is suffering from a mental disease or defect, does that disease or defect prevent him from understanding his legal position and the options available to him?
>
> (3) If the person is suffering from a mental disease or defect which does not prevent him from understanding his legal position and the options available to him, does that disease or defect, nevertheless, prevent him from making a rational choice among his options?

While there may be differences in terminology, it is clear that the test for competence requires more than a showing that the inmate has the intellectual ability

to understand and appreciate his position, but must also be able to make the choice to abandon further litigation rationally, that is, without the decision being "substantially affected" by the mental disorder.[5]

Here, the narrow issue is whether Mr. Dennis has the ability to make a rational decision to be executed.[6] The only evidence before the district court (and before the

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[5] There is some confusion over whether (or how) the test for competence in this context differs from the test for competence to stand trial under Dusky v. United, 362 U.S. 402, 402 (1960). Compare Mata v. Johnson, 210 F.3d 324, 329 n. 2 (5th Cir. 2000), with Godinez v. Moran, 509 U.S. 389, 396 (1993) (equating Dusky standard for competence for trial with competence to plead guilty). While the Dusky standard refers to the individual's ability to consult with counsel with "rational understanding" and his "rational as well as factual understanding of the proceedings," the Rees test focuses on the rationality of the individual's decisions, not merely his understanding of them. Mata v. Johnson, 210 F.3d at 329 n. 2. In the end, the tests may not be different, if the Dusky test is properly understood as requiring not merely the abstract "ability" to cooperate with counsel, but the capacity to decide rationally whether to cooperate with counsel without the decision being "substantially affected" by mental illness.

In some cases, this confusion in terminology may not cause confusion: here, for instance, Dr. Bittker recognized that Mr. Dennis' decision was a product of his mental illness despite that conclusion not fitting clearly into the Dusky questions. See X ER 1602-1603. Dr. Lynn, however, who was not asked about Mr. Dennis' ability to make rational decisions (as opposed to merely having an understanding of his situation and an ability to consult with counsel) did not offer an opinion on that specific issue. IV ER 740-742.

[6] Ms. Butko does not challenge Mr. Dennis' intellectual understanding of his situation. XI ER 1839-1840.

There can be no rational dispute that Mr. Dennis suffers from mental disorders. Mr. Dennis himself has acknowledged it, IV ER 669-670, VI ER 1055-1057, and the mental health evidence is uniform in finding the existence of mental disorders. See p. 6, note 2, above.

state courts) on this specific issue is that Mr. Dennis' decision is "directly a consequence" of his mental illness, ER 1602, and that his insistence on being executed is the product of his disorder and not of his volition. XI ER 1856-1859. Unlike the welter of other published decisions in which there was disagreement among the experts on the specific question in issue, see, e.g., Demosthenes v. Baal, 495 U.S. 731, 736 (1990); Ford v. Haley, 195 F.3d 603, 611-615 (11th Cir. 1999); Wells v. Arave, 18 F.3d 656, 657 (9th Cir. 1994); Brewer v. Lewis, 989 F.2d 1021, 1025-1027 (9th Cir. 1993); Rumbaugh v. Procunier, 753 F.2d at 397; Vargas v. Lambert, 159 F.3d 1161, 1176-1177 (9th Cir., 1998) (Kleinfeld, J., dissenting), stay vacated 525 U.S. 925 (1998), here there are no contrary opinions.[7]

Mr. Dennis himself asserted, at the plea canvass, that he had been treated for years for "severe chronic depression," and that he suffers from "Bipolar Two

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Although the state claimed below that Ms. Butko is not an appropriate next friend, XI ER 1783-1784, the district court did not rule on that claim, and it is clear that a former counsel for Mr, Dennis (for whom he has expressed "some positive regard," X ER 1600) can fulfill that role. E.g., Hauser ex rel. Crawford v. Moore, 195, 227 F. 3d 1316, 1322 (11th Cir. 2000); In re Cockrum, 867 F. Supp. 494, 495 (E.D. Tex. 1994); Lenhard v. Wolff, 443 U.S. 1306, 1310 (1979) (Rehnquist, J., in chambers).

[7] As noted above, Dr. Lynn's five-year-old report did not specifically refer to Mr. Dennis' ability to make rational decisions. IV ER 740-742. Dr. Lynn's report also did not ferret out Mr. Dennis' admission to Dr. Bittker that he was seeking to make the state kill him because he had not been able to kill himself in a sufficiently painless manner. X ER 1603, XI ER 1859.

Disorder," IV ER 669-670, which necessarily includes depression. When asked at the plea canvass if he was still suffering from any mental illness, Mr. Dennis replied, "I imagine so. But, I mean, they just don't go away." IV ER 671 (emphasis supplied). At the penalty hearing, Mr. Dennis again agreed that he was not "totally sane." VI ER 1055, and that he suffers from Bipolar II Disorder.[8] He has repeatedly been diagnosed with "recurrent" depression, II ER 271, IV ER 619, and Dr. Lynn's 1995 report indicated not only that his psychological disorder was "severe" and his clinical depression "moderate to severe," but that Mr. Dennis is "prone to . . . depression." IV ER 742.

Dr. Bittker's report documented consistencies between Mr. Dennis' current thinking, and the other evidence of Mr. Dennis' chronic depression and suicidal ideation. X ER 1597, 1602. Dr. Bittker's report also described Mr. Dennis as

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[8] He explained the disorder as follows:

> The condition itself used to be called manic depressive, okay. You go in extreme manic stages, and then you have extreme depressive stages.
>
> I didn't have the manic. I would vary from the - - bipolar II is another diagnosis for that. I go from what would be more or less normal to severe depression.

VI ER 1053.

"emotionally distant," and "constricted," and noted that "he appeared on the threshold of tears" at one point in the interview. Mr. Dennis' statements made when he was actively suicidal but not in prison are similar to his statements in court seeking to justify his decision to seek execution. Compare VI ER 1063 ("don't see a whole lot to look forward to") with II ER 276 ("'. . . feeling helpless, hopeless and worthless.' 'I just want to be peaceful,' 'I don't know what I'll do,' 'I can't see the point in this anymore.'"), III ER 481 ("nothing to live for"), III ER 421 ("he does not care to live anymore"), III ER 441 ("he would prefer to go to sleep than to inflict some violent means upon himself"), II ER 290 ("cornered and desperate"). Dr. Bittker's report made the direct correlation between Mr. Dennis' "psychiatric disorder" and his resulting decision that "he wishes to die and he wishes to be certain of a reasonably humane death," X ER 1603, which is strikingly similar to Mr. Dennis' expressed wish to "go to sleep," when he was actively suicidal in 1995. Mr. Dennis himself told the state court at sentencing that he had "lost count" of how many times he had attempted suicide. VI ER 1058.

Against this evidence there is nothing, except the lay observation of the lower courts. Dr. Bittker's testimony, however, made it clear that Mr. Dennis' apparent lucidity did not suggest that he had an ability to make a decision that is not dictated by his mental disorder. XI ER 1858. The doctor also explained that Mr. Dennis'

vehemence in his decision was in itself a sign that the decision was not volitional but was dictated by his disorder. XI ER 1858-1859. Dr. Bittker himself acknowledged that Mr. Dennis is not "demented" or "delirious" or "psychotic," but nevertheless adhered to his professional opinion that the decision to seek death was the result of his disorder and not of rational volition. XI ER 1858-1859. The district court did not make any finding that would be a basis for rejecting that evidence; and it is clear that lay observations do not produce reliable assessments of the effect of mental disorders. See Lokos v. Capps, 625 F.2d 1258, 1267 (5th Cir. 1980) ("one need not be catatonic, raving, or frothing, to be unable . . . to relate realistically to the problems of his defense"); Lafferty v. Cook, 949 F.2d 1546, 1555 (10th Cir. 1991) (untrained people often have difficulty recognizing signs of mental illness from defendant's demeanor); see also Miller ex rel. Jones v. Stewart, 231 F.3d 1248, 1254 (9th Cir. 2000) (Fisher, J., concurring) ("crediting [petitioner's] position begs the question of his competence"), stay vacated, 531 U.S. 986 (2000).

In short, all the evidence before this Court establishes that Mr. Dennis is not competent under the Rees test, and no rational court could find to the contrary. Accordingly, this Court must reverse the district court's order and remand the case for further proceedings on the petition.

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B. The District Court Erred in Applying the Presumption of Correctness to the State court Finding that Mr. Dennis is Competent to Seek Execution, Because the Uncontradicted Evidence that His Decision is "Directly a Consequence" of His Mental Illness is Clear and Convincing, and Because the State Court Proceeding that Generated the Unreliable Finding was Non-Adversarial.

In denying the petition and rejecting the claim of standing, the district court relied on the presumption of correctness afforded to state court factfindings under 28 U.S.C. § 2254(e)(1). XI ER 1900. That presumption does not prevail here for two reasons: First, the state court proceeding was unreliable, because there was no attempt to test the evidence in adversary litigation; and second, the expert evidence that Mr. Dennis is not competent is so clear and unequivocal that the state courts could not rationally find him competent.

At the state court hearing on December 4, 2003, appointed counsel for Mr. Dennis made it clear that he was taking the ethical position that he would not litigate against his client's wishes in seeking death. X ER 1621, 1645. As a result, Dr. Bittker was not called to testify, and the state court did not hear his unequivocal opinion that Mr. Dennis' decision was not a product of his own volition, but was the product of his mental disorder. XI ER 1858-1859. Equally important, however, that court did not hear Dr. Bittker's expert testimony that Mr. Dennis' demeanor did not mean he was competent: his apparent lucidity could demonstrate that he had an

intellectual understanding of his situation, but his ability to make a rational choice could still be prevented by his mental illness; and his adamant and unswerving insistence on being killed could itself be an indication that his disorder was controlling his will. XI ER 1858-1859. The state court's order cited Mr. Dennis' denial of suicidal ideations while he was in prison as a basis for disregarding Dr. Bittker's report, X ER 1658, and it is likely that Dr. Bittker's testimony would have made clear to the state court (as it did in the federal hearing) that Mr. Dennis' suicidal ideation was chronic and continuing, and that his desire for execution was a manifestation of his disorder.[9] Similarly, the state court's order cited its observations of Mr. Dennis, X ER 1658-1659, and it appears that the state court assumed that it could "read" Mr. Dennis' demeanor accurately as a sign of competence. Had Dr. Bittker testified, he could have corrected the state court's misunderstanding on that issue, and the state court would have been left with no basis at all for rejecting Dr. Bittker's conclusion.

Under these circumstances, the state court proceeding was not fundamentally

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[9] While Mr. Dennis denied having any current suicidal ideation, X ER 1658, his testimony was obviously self-interested, and Dr. Bittker testified that psychiatric patients often misrepresent their symptoms for their own purposes, and that Mr. Dennis would want to "emphasize his own competence." XI ER 1852. By contrast, no one has suggested any conceivable motive on the part of Dr. Bittker, an expert used more by prosecutors than defense counsel, XI ER 1866, for exaggerating Mr. Dennis' incompetence.

fair or reliable: adversarial testing is the main guarantee of the reliability of the result of a proceeding. See, e.g., United States v. Cronic, 466 U.S. 684, 656-657 and n. 14 (1984); see also Crawford v. Texas, 124 S.Ct. 1354, 1370 (2004) (reliability best determined by adversarial testing through cross-examination).[10]

In its most recent decision on the presumption of correctness, this Court, speaking through Judge Kosinski, held that the presumption does not apply if:

> "the fact-finding process itself is defective. If, for example, a state court makes evidentiary findings without holding a hearing and giving petitioner an opportunity to present evidence, such findings clearly result in an 'unreasonable determination' of the facts."

Taylor v. Maddox, 366 F.3d 992, 1001 (9th Cir. 2004) (citations omitted). Here, the lack of adversity made the state process equally "defective." Although the state court did hold a hearing, only one side's position was urged, and that fundamental, "intrinsic" defect in the process renders that presumption inapplicable. Id., at 1000-1001; see Barnett v. Hargett, 174 F. 3d 1128, 1136 (10th Cir. 1999) ("reason to doubt" adequacy or accuracy of fact-finding proceeding where no cross-examination and

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[10] The Supreme Court recognizes the importance of adversary litigation by appointing counsel to act as amicus curiae when there is a lack of adversity between parties. Martinez v. Lamagno, 515 U.S. 417, 423 n. 4 (1995) (noting appointment of amicus curiae to argue adversary position where parties declined to do so); Granville-Smith v. Granville-Smith, 349 U.S. 1, 4 (1954) (same); see Chicago Grand Truck Ry. Co. v. Wellman, 143 U.S. 339, 345-346 (1892) (noting danger of deciding constitutional issues in absence of adversary litigation).

testing of facts by counsel).

Further, Taylor provides a framework for analyzing "intrinsic" defects in the state fact-finding process that prevent applying the presumption by reference to the "unreasonable determination of the facts in light of the evidence" standard of 28 U.S.C. § 2254(d)(2). 366 F.3d at 999-1008. "[T[he state court fact-finding process is undermined where the state court has before it yet apparently ignores, evidence that supports petitioner's claim." Id. at 1001 (citations omitted) "[F]ailure to take into account and reconcile key parts of the record casts doubt on the process by which the finding was reached, and hence on the correctness of the finding." Id. at 1008 (citations omitted).

In this case, as in Taylor, the state courts failed "to consider key aspects of the record," namely the "very significant" evidence of Dr. Bittker's conclusion. The state district court's order devoted no analysis at all to the conclusion that Mr. Dennis' decision was "directly a consequence" of his mental illness. X ER 1603. Instead, the court relied on its own lay observation of Mr. Dennis, whose statements may have demonstrated an intellectual understanding of his situation but shed no light on whether his decision was the result of free volition or of mental illness. The Nevada Supreme Court's decision equally disregarded the critical conclusions in Dr. Bittker's report and simply relied on the lower court's lay conclusions as to Mr. Dennis'

competence. X ER1703-1705. Further, the state courts' reliance on Mr. Dennis' denial of suicidal ideation ignored the expert's analysis that both the commission of the homicide and the decision to seek execution were the product of Mr. Dennis' chronic depression and long-term desire to die. X ER 1602-1603.[11]

Under Taylor, the district court could not properly apply the presumption of correctness to the state court findings. Given the unequivocal evidence that Mr. Dennis' decision is the product of his mental disorder, the district court was required to find that Ms. Butko has standing: the district court's lay perception of Mr. Dennis' "overall competence," XI ER 1902, equally disregarded Dr. Bittker's uncontradicted evidence that the decision was the product of mental illness. The district court's order did not cite any basis for rejecting that testimony (other than the presumption of correctness), or for disregarding the expert's analysis of Mr. Dennis' demeanor as a sign of the effect of his disorder, a matter that lay individuals could easily mistake. Accordingly, the District Court's order is not supported by the evidence and it must be reversed.[12]

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[11] In essence, Mr. Dennis no longer needs what would normally be described as suicidal ideation, because he has successfully enlisted the state's help in obtaining a "reasonably humane" death which he had been unable to accomplish on his own. See X ER 1603.

[12] Even if the presumption of correctness could be applied in this case, the evidence before the district court was sufficiently "clear and convincing," 28 U.S.C.

VI.

CONCLUSION

For the reasons stated above, appellant petitioner, Dennis, through his next friend, submits that this Court must reverse the district court's order denying the petition and remand for further proceedings on the merits of the petition.

VII.

STATEMENT OF RELATED CASES

To appellant's knowledge, there are no related cases pending in this court.

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§ 2254(e)(1), to overcome it. Dr. Bittker's uncontradicted testimony made it clear that Mr. Dennis' decision to seek execution is a product of his mental disorder, without any equivocation or confusion hinted at by the state courts, see X ER 1620 (suggesting Dr. Bittker's analysis was "alternative statements"); and the doctor's analysis of Mr. Dennis' demeanor (which was not before the state court) made it clear that his apparent intellectual lucidity did not mean that his will was not controlled by his mental illness and that his insistence on execution was in itself an indication of the effect of his disorder. Under these circumstances, the evidence that Mr. Dennis is incompetent under the Rees standard is so overwhelming that even the presumption of correctness must yield to the evidence before the district court.

VIII.

CERTIFICATE OF COMPLIANCE

The typeface used in this brief is proportionately spaced 14-point. The total number of words is 6294.

Respectfully submitted this 12th day of July, 2004.

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CERTIFICATE OF SERVICE

In accordance with Rule 5(b) of the Federal Rules of Civil Procedure, the undersigned hereby certifies that on this 12th day of July, 2004, I deposited for mailing in the United States mail, first-class postage prepaid, and sent via electronic mail, a true and correct copy of the foregoing APPELLANT'S OPENING BRIEF to:

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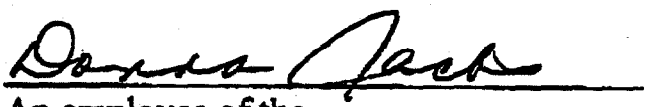

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